STATE OF MICHIGAN

COURT OF APPEALS

QUICK-SAV FOOD STORES, LTD., and ROBERT EASTMAN, Plaintiffs-Appellees,	UNPUBLISHED January 10, 2008
v	No. 272785 Genesee Circuit Court
KENNETH H. MATTIS and DENNIS MATTIS, Defendants-Appellants.	LC No. 05-082671-CK

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant Kenneth Mattis appeals by leave granted from the trial court's denial of his motion for summary disposition.[1] We reverse.

Plaintiffs and Woodland Oil Company ("Woodland") entered into a lease agreement wherein plaintiffs operated various gas stations. Plaintiffs allegedly breached the lease agreement, and a lawsuit was filed. Ultimately, the parties settled the dispute and required plaintiff Quick-Sav Food Stores, Ltd., to make payment of $125,050 to Woodland. The agreement further provided: "In return, Woodland Oil Company agrees to hold Quick-Sav harmless for any contamination problems that exist or may develop in the future." The agreement was signed by plaintiff Robert Eastman and defendant on February 27, 1998, but the signatures on the agreement did not contain any designation regarding individual or corporate capacity.

Between June 1998 and June 2001, Woodland sold the properties, and the corporate entity was dissolved on December 31, 2001. A notice of the dissolution was published in a newspaper on January 19, 2002. In July 2005, the Michigan Department of Environmental Quality ("DEQ") instructed plaintiff Quick-Sav to investigate and remediate any environmental

[1] Although Dennis Mattis is designated as an appellant, there was no claim pending against him at the time of summary disposition. Rather, after deciding the motion for summary disposition, the trial court granted plaintiffs permission to file a first amended complaint to add him as a defendant. Accordingly, the singular "defendant" refers to Kenneth Mattis only.

contamination that may have occurred at the sites it operated. Plaintiffs asserted that, pursuant to the settlement agreement, defendant agreed to indemnify plaintiffs for any environmental remediation. Consequently, plaintiffs filed this complaint alleging one count of breach of contract against defendant, asserting that there was an indemnity contract signed by defendant in his individual capacity, and count two asserting that the corporations act was violated when the corporate entity was dissolved without adequately providing for known liabilities. The trial court denied defendant's motion for summary disposition, holding that there were factual issues. We granted defendant's delayed application for leave to appeal.

Summary disposition decisions are reviewed de novo on appeal. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). "An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). When the language of a contract is clear and unambiguous, its construction presents a question of law for the trial court. *Michigan National Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998). The duty to interpret and apply the law is allocated to the courts, not the parties or their witnesses. *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997).

Review of the contractual agreement settling the prior lawsuit reveals that it did not provide for indemnification by defendant as an individual. Rather, it merely provided that the corporate entity, Woodland, would hold the corporate entity, plaintiff Quick-Sav, harmless for any environmental contamination. Moreover, there is no indication that defendant in his individual capacity agreed to indemnify plaintiff corporation "its agent, officers, and employees from and against any and all liability, loss, damage, cost or expense …"[2] Accordingly, the trial court erred in denying summary disposition of the breach of contract claim.[3]

Defendant next asserts that the trial court erred in denying his motion for summary disposition of the claim alleging "violation of MCL § 450.1855a, Distributions Made Without Provision for Known Liabilities." We agree. MCL 450.1855a provides that a corporation shall pay or make provision for its debts, obligations, and liabilities before making a distribution of assets to shareholders. Although MCL 450.1855a does not address individual director or shareholder liability, MCL 450.1551 provides that directors are jointly and severally liable to the corporation for debts, obligations, and liabilities that were not paid during or after dissolution of

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[2] See *Michigan Municipal Liability & Property Pool v Muskegon Co Bd of Commissioners*, 235 Mich App 183, 185 n 1; 597 NW2d 187 (1997), for an example of indemnification language.

[3] Plaintiffs assert that there is a factual issue regarding whether the agreement was signed in an individual or representative capacity. However, the agreement provides that it involves the corporate entity. Moreover, plaintiffs failed to cite any authority addressing whether a signature without any designation can be construed as imposing individual liability. A statement of position without citation to authority is insufficient to raise an issue before this Court. *Mann v Mann*, 190 Mich App 526, 536-537; 476 NW2d 439 (1991).

the corporation. These statutes, read together, impose "joint and several liability on directors who vote in favor of or concur in a corporate decision to distribute assets to a shareholder without paying or adequately providing for all known debts and liabilities to the corporation." *Christner v Anderson, Nietzke & Co*, 433 Mich 1, 7, 12; 444 NW2d 779 (1989).

Although MCL 450.1551 provides for director liability, an action to impose liability upon a director for a violation of section 551 "shall be commenced within 3 years after the cause of action accrues." MCL 450.1554. Causes of action generally accrue "at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Boyle v Gen'l Motors Corp*, 468 Mich 226, 231; 661 NW2d 557 (2003). "Wrong" refers to the date on which the plaintiff was harmed, not necessarily on the date which defendant acted. *Id*. at 231 n 5, citing *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995). The wrong on which plaintiffs' claim was based was the distribution of assets allegedly without adequate provision for known or anticipated liabilities. This occurred more than three years before plaintiffs filed their complaint. Accordingly, plaintiffs' complaint was not filed within the three year time period set forth in MCL 450.1554.

Plaintiffs assert that the claim may proceed because MCL 450.1842a(4) contains a six-month discovery rule. However, when statutory language is plain and unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning and further construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Applying the plain language of the statutes at issue, there is no six-month discovery rule applicable to director liability. Rather, MCL 450.1551 contains a flat three-year period without any additional extension. Moreover, MCL 450.1842a is not a statute of limitations, but rather, a corporate survival statute. *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 111-112; 677 NW2d 856 (2003). Accordingly, the trial court erred in denying defendant's motion for summary disposition of the corporate liability claim against the individual director when it was filed outside the three-year limitations period.[4]

Reversed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood

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[4] For the first time on appeal, plaintiffs assert that there is a third potential statute of limitations period, the six-year period applicable to contract or equity actions. This argument is not preserved for appellate review because it was not raised, addressed, and decided in the lower court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). In any event, we reject this newly raised argument. Irrespective of the time period for bringing a breach of contract claim, plaintiffs did not name the real party in interest with regard to the breach of the settlement agreement, the corporate entity involved in the contract.